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Emergency penality and authoritarian liberalism

Recent trends in Colombian criminal policy

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Abstract

This article discusses how the normalization of emergency penality, together with the rise of neoliberalism in the Colombian political and economic fields during the last decade, has given rise to authoritarian liberalism—a political model which encourages the hypertrophy of the penal state and the reduction of the social state. Colombian ethnic minorities, the indigenous and black populations, have suffered disproportionately from social exclusion and political violence, becoming victims, not only of illegal armed actors, but also of the punitive policies of Colombian governments. The normalization of emergency penality and the predominance of authoritarian liberalism are by no means peculiarities of the Colombian context, but the manifestation—in rather extreme circumstances—of a global trend that deploys punishment to uphold neoliberalism.

Key Words

Colombia • emergency penality • ethnic minorities • neoliberalism • states of emergency

Introduction

Colombia has an outstanding record of stable democratic regimes when compared to the military dictatorships experienced by most of the Latin American countries during the second half of the 20th century. It has enjoyed

constant—though modest—economic growth,[1] escaping the major crises that hit most Latin American countries, particularly during the 1970s and 1980s (Thoumi, 1995: 1, 2). Notwithstanding such promising signs, Colombia's contemporary history has also been marked by intense violence and injustice. Although social indicators have improved during the last three decades, there remains an enormous gap between the rural and the urban populations, and between the wider poorer class and the small elite at the top. The indigenous and black populations[2] suffer disproportionately from poverty, lack of access to basic social services, unemployment and labour market discrimination.[3] Even though governments and most of civil society are prone to cover up the fact that racial discrimination exists in Colombia, just as in other Latin American countries, it is a dismaying reality, a basic aspect of the 'democratic deficit' that the region is experiencing (Dulitzky, 2005: 1, 3).

All these things considered, it is hardly surprising that, according to the United Nation's Gini index, by 2000 Colombia had the ninth most unequal division of wealth in the world. Such an unequal distribution of wealth, which affects especially minority ethnic groups, has given rise to social and political conflicts which, having failed to find an institutionalized way of being discussed and solved, have ultimately resulted in extreme and pervasive forms of violence.

A protracted armed conflict (that has endured more than 40 years) between the State, leftist guerrillas and right-wing paramilitaries, as well as the corrupting power of narcotrafficking—among other factors—have contributed to the erosion of the rule of law. The origins of the current armed conflict go back to the 1950s: between 1948 and 1956 Colombia experienced one of the most violent and dividing civil wars of its history, between Liberals and Conservatives, which caused approximately 300,000 deaths (Palacios, 2006: 136). In 1956 Liberals and Conservatives made a political agreement, known as *Frente Nacional* (National Front), which would become a milestone of contemporary Colombian politics. According to the agreement, both parties would rule under a bipartisan government. Thus, it was established that, during a fixed period of time (sixteen years), the presidency would be alternated between Liberals and Conservatives and all the positions in the three branches of power would be evenly distributed between the two traditional parties.

Although the *Frente Nacional* pacified the country, in the longer term it delegitimized the traditional parties, politics and the State itself. Growing sectors of the population felt betrayed by their parties, as their interests and needs were not addressed, while the institutional exclusion of political alternatives, other than the two traditional parties, provided a justification (particularly to the Left) to operate outside the political system to achieve power. Consequently, the Communist Party supported movements of armed peasants that were fighting in frontier zones for their rights to land, subsistence and self-defence against the State, which they considered an oppressor. These peasant armed movements were the seed of the FARC (Armed Revolutionary Forces of Colombia), the most powerful Colombian guerrilla movement formed in 1966 and one of the oldest subversive groups in the world.

During the 1980s and the early 1990s, Colombian society faced a complex context: economic adjustment programmes; liberalization of the economy under the pressure of globalization; the beginning of the war against the drug cartels and the so-called *narcoterrorism*; the strengthening of the guerrillas and the consequent intensification of the armed conflict, which was worsened by the arrival of a new armed actor: the right-wing paramilitaries. Thus, it is hardly surprising that the 1984–91 period was characterized by a public order crisis. The open war that the State waged against the drug cartels began on 30 April 1984, when the Medellín cartel assassinated the Justice Minister Rodrigo Lara Bonilla for his combative stance against narcotraffickers. Faced with the great social and political commotion that the killing of a prominent minister and politician caused, the Betancur government (1982–6) declared the state of emergency on 2 May.[4] The state of emergency was uninterruptedly enforced for more than seven years, spanning the terms of three different presidents.

As a result of the armed conflict and the war on drugs, levels of violence were extremely high throughout the 1980s and 1990s; between 1985 and 1995 there were around 300,000 violent deaths of all origins (Pécaut, 2001: 187). Amnesty International (2002) estimates that approximately 60,000 people died in Colombia between 1985 and 2002 for political reasons; 80 per cent of them were civilians with no direct involvement in the armed conflict.

The indigenous and black population have been a common target of illegal armed groups. Their leaders have repeatedly been killed and threatened by guerrilla forces and paramilitaries. Most of these attacks and threats stem from the insistence made by these communities that they want to keep their neutrality vis-à-vis the armed conflict. Both paramilitaries and guerrilla groups often accuse indigenous and Afro-Colombian communities of collaborating with their respective enemies as a result of their refusal to take sides in the conflict. According to ONIC (*Organización Nacional Indígena de Colombia*—the National Indigenous Organization of Colombia), more than 500 indigenous leaders were assassinated between 1975 and 1999 (CERD, 1999). Indigenous peoples have been also disproportionately affected by forced displacement—during the first half of 2006, some 5773 members of various indigenous communities were displaced (IACHR, 2006).

As for the black population, large numbers of Afro-Colombians live in some of the most conflict-ridden areas of the national territory. As the Inter-American Commission on Human Rights points out, terror and violence exerted by all of the contending forces in Colombia have affected mainly Colombians living in extreme poverty—a disproportionate number of whom are black citizens (IACHR, 1999). In the Chocó department, where the population of African descent accounts for 85 per cent of the total and lives in extreme poverty, between 2006 and 2007, illegal armed actors killed 264 people; 21,184 were forcibly displaced (Observatorio del Porgrama Presidencial de Derechos Humanos y DIH, 2008). According to

CODHES (*Consultoría para los Derechos Humanos y el Desplazamiento* (Counsellory on Human Rights and Displacement)), by 2006, Afro-Colombians, who account for 10.6 per cent of the Colombian population, represented around 30 per cent of its displaced population (IACHR, 2006).

Colombian governments have proved incapable of taming violence and crime through legal means. Such weakness has been demonstrated in their tendency to abandon democratic rule and privilege the use of force and repression, mainly through the continuing declaration of the state of emergency. For more than 46 years (from 1950 to 1997), Colombia was ruled under the state of emergency (Ariza et al., 1997: 7; García, 2001: 1). This continuous use of emergency measures has had a deep impact on the Colombian criminal justice system. A significant part of the criminal statutes and measures enacted in Colombia during the last four decades has been the result of emergency norms; of 274 emergency decrees enacted between 1984 and 1996, 111 decrees (i.e. 40%) referred to criminal justice (García, 2001: 342).

The political tendency to enforce emergency measures to investigate, prosecute and sentence what governments regard as dangerous criminals, has structured a particular kind of criminal justice in Colombia. This kind of justice, which I will call *emergency criminal justice*, is characterized by the granting of broad powers to state security forces (i.e. search, seizure and arrest powers without a judicial warrant) and the hardening of criminal procedures and punishments (i.e. longer terms of detention; proscription of liberty under bail and parole; secret witnesses, prosecutors and judges; and longer prison sentences). It has also resulted in the violation of the human rights and legal guarantees of those prosecuted (i.e. the rights to due process, to liberty and the presumption of innocence).

In the following pages I will consider the different political and social functions that emergency criminal justice, or *emergency penality* as I will also call it, has played in the Colombian context during the last decade. The main thesis of this article is that the normalization of emergency penality, together with the consolidation of conservatism and neoliberalism in the Colombian political and economic fields have created a *penal commonsense* that encourages the hypertrophy of the penal state and the reduction of the social state (Wacquant, 2000: 79, 144). Thus, governments have become concerned mainly with enhancing control mechanisms in order to provide security for markets and investment with the argument that only then can economic and social rights flourish. This penal strategy is characterized by an authoritarian and economicist rationality that underplays political and social considerations while introducing into the crime control field dogmas of individual responsibility and market efficiency. Another central tenet of this article is that the normalization of emergency penality is by no means peculiar to the Colombian context, but is the manifestation, in rather extreme circumstances of violence, inequality and social exclusion, of a global trend: the intensive use of punishment to uphold neoliberalism. For the Colombian case, I will call such model of governance *authoritarian*

liberalism,[5] which understands democracy as a mix of a free-market economy with a strong state, heavily relying on criminal control strategies to deal with the social turmoil.

Emergency penality and the consolidation of the neoliberal order

Emergency penality has changed and adapted to different political, economic and social circumstances throughout late modernity. Though some positive changes have occurred in the Colombian political system and society in recent years, emergency penality stubbornly remains; not only this, it has actually expanded and blended with the rule of law—it has, in short, become permanent (see Agamben, 2005). Governments of different political persuasions, be they Conservative or Liberal, have resorted insistently to emergency measures to defend the establishment from what it perceives as threats to its interests and even to its very existence. I shall briefly discuss the politics of emergency penality in Colombia during the last decade, marked by the war on drugs, the escalation of the armed conflict and the implementation of broad political and economic reforms, aimed at strengthening democracy and the rule of law, as well as liberalizing the economy.

During the late 1980s and early 1990s, Colombia experienced important political and economic transformations. On the one hand, legal and constitutional reforms, spearheaded by the 1991 Constitution, led to the strengthening of democratic institutions and the rule of law. On the other hand, the Barco (1986–90) and Gaviria (1990–4) administrations undertook economic reforms that liberalized the Colombian economy and placed it in the sphere of globalization and neoliberalism. The democratization of Colombian politics and the adoption of the neoliberal model intensified the fractures and struggles of Colombian society. For one thing, the political hegemony, particularly of local and regional elites, was threatened by alternative political parties and social movements that entered the political scene and clamoured for their rights, enshrined in the new Constitution. For another, the new economic model mainly benefited the upper classes while excluding the most vulnerable and marginalized social groups, which in Colombia make up almost half of the population. Thus, poverty remained unchallenged while social inequality increased.[6]

Regarding ethnic minorities, the Constitution granted indigenous peoples and Afro-Colombians collective property rights over the land they have inhabited and exploited according to their traditions. Accordingly, indigenous communities own around 27 per cent of the Colombian territory, while Afro-Colombians have collective rights over significant stretches of land, particularly on the Pacific coast. This has led to confrontations with large landowners and illegal armed groups, who in many instances have taken possession of such lands through violent means. The indigenous and Afro-Colombian territories are of vital importance for illegal armed groups, since they are strategic zones for their military and economic operations—they are

transit routes and refuge areas for their troops, for the trafficking of weapons and for the cultivation, processing and trafficking of drugs. Furthermore, the pressure of the guerrillas and paramilitaries, and major economic groups, on such territories and their inhabitants has increased, due to heightened economic interest in the natural resources of these territories, and in the development of major road, mining and hydroelectric projects (IACHR, 2006).

As a result of these political and social tensions the armed conflict intensified during the 1990s. Two different but related phenomena further explain the escalation of violence: narcotrafficking and paramilitarism. Despite the Colombian and US governments' repressive efforts, narcotrafficking was not defeated; it simply changed hands. After the demise of the Medellín and Cali cartels in the early 1990s, the guerrillas took over a great part of the business. At the same time, the paramilitaries—the guerrillas' deadly rivals—significantly increased their power. Supported by narcotraffickers, landowners, industrialists, a sector of the military and regional elites, the paramilitaries waged a dirty war against the civilian population.

The Álvaro Uribe government (2002–present day) has confronted such a difficult situation from a conservative and neoliberal perspective. It has put all its efforts towards the military defeat of the guerrillas and the reduction of narcotrafficking, while it has negotiated the demobilization of the paramilitary groups. The aim of this security policy, called *Democratic Security*, is to achieve a highly militarized public order to attract foreign investment and guarantee economic growth. Only then, so goes the Government's rationale, will it be possible to redistribute wealth and improve the quality of life of the Colombian population.

Uribe has accentuated a tendency of previous governments to mingle the armed conflict with the phenomena of terrorism and narcotrafficking—what has changed is that the idea of an armed conflict has mainly become conflated with the more emotive conceptions of drugs and terror threats; according to Uribe, they are two faces of the same problem, because the former finances the latter. He has claimed that nowadays 'political violence and terrorism are identical. Any act of violence committed for political or ideological reasons is terrorism. The violent defence of the rule of law is also terrorism' (Uribe, 2002: point 33).

Uribe thus continued the tradition of previous governments in regarding criminality as an extreme problem that demands exceptional measures. Accordingly, he pointed out in his political manifesto the need to enact an antiterrorist statute in order to increase the efficiency of the security forces by granting them powers of search, seizure and arrest in terrorism-related activities (Uribe, 2002: point 33).

According to the Democratic Security doctrine, there is no place for neutrality; the only two options are *with* or *against* the State. Thus, the Government has undertaken mass arrest operations against thousands of people accused of belonging to or collaborating with subversive groups (CCEEU, 2005: 1). According to the UNHCHR (2005), based on information provided

by the police, out of some 259,400 arrests carried out as at 10 October 2004 only 17 per cent were previously authorized by judicial authorities, while a staggering 82 per cent of arrests did not have such authorization, for they supposedly occurred under 'urgent situations'; more than 50 per cent of these arrests were based on 'suspicion of belonging to illegal armed groups', thanks to the tip-offs of secret informants (UNHCHR, 2005). Between 7 August 2002 and 6 August 2004, 6332 people were arbitrarily arrested (5535 of them in 77 mass arrest operations), while the number of arbitrary detentions between July 1996 and June 2002 was 2869.[7] President Uribe himself has encouraged the security forces to undertake this strategy to produce results; in a public speech at a congress of coffee growers he declared:

> Last week I told General Castro [General Commander of the National Police] that in that zone [Sierra Nevada de Santa Marta] we could not carry on with massive arrests of 40 or 50 people every Sunday; we need to arrest 200 people to speed up the imprisonment of terrorists and hit these organizations. These arrests have been massive, but not arbitrary. They have strictly respected the rule of law. They have been carried out after a careful examination of the evidence available.[8]

Even though there are no data that account for the impact of the Democratic Security policy upon ethnic minorities, it may be said that, given their particular condition of social exclusion and the violence that reigns in most of the areas they inhabit, they have borne the burden of the armed confrontation, for they are finding themselves increasingly caught up in the cross-fire between the State, guerrilla groups and paramilitaries. For instance, according to the National Indigenous Organization of Colombia (ONIC), between January and June 2006, a total of 143,263 crimes and International Humanitarian Law (IHL) violations were committed against indigenous peoples (IACHR, 2006). They have been victimized disproportionately, since the rate of such crimes and violations against the indigenous people is three times higher than the national rate (Villa and Houghton, 2005: 12).

Uribe's Democratic Security, though supposed to be democratic in the sense that it allegedly protects all citizens without distinction, tends to safeguard investment, wealth and economic growth, mainly favouring a minority of the population. This is not to say that Uribe's Democratic Security and economic policies are against the poor—it is just that they do not care for them. To that extent, the Colombian case follows Sen's view that with the liberalization of the economy and the triumph of neoliberalism in many peripheral and semi-peripheral countries, the poor classes, forgotten by the states, irrelevant to the markets, have been given 'the sticks of the global economy without tasting the carrots' (2006: 141).

Uribe's political project has extended further than any of his predecessors the authoritarian liberal model that has characterized Colombia from the second half of the 20th century. His administration decisively defends the ideas of democracy, the rule of law and the protection of the human rights

of all citizens. But it champions a *particular* interpretation of those ideas, which is politically conservative. Such a limited conception of democracy gives priority to freedom (mostly its economic aspect) over equality. Despite declaring its commitment to human rights in general, this conservative version of democracy actually focuses on the protection of negative freedoms, which require the State to refrain from intervening in the liberty of individuals, favouring those who have the economic resources, social status and political influence to exercise them effectively.

This political conception of democracy sees the conflicts that arise in society between individual rights (that guarantee individual freedom and property) and collective rights (the economic and social rights that foster fair access to economic and social resources) as a social dysfunction that must be corrected—but mainly to protect the former, which takes precedence over the latter. Thus, social conflicts, which cause disorder, are seen as obstacles that hinder development and economic growth. This kind of economic liberalism becomes authoritarian when it conceives social upheaval exclusively as a problem of public order that must be dealt with through repressive measures. Hence, to protect democracy and human rights, the State actually curbs them.

The mechanics and rhetoric of emergency penality

This brief description of the last decade during which emergency criminal justice firmly established itself within the Colombian political and legal orders leads to a simple question: why did this occur and why is it still happening? Why has this kind of justice, which inverts the rule of law and should thus exist only in exceptional circumstances, coexist almost uninterruptedly with ordinary criminal justice?

Emergency criminal justice has been more than simply a criminal policy applicable to emergency circumstances. Emergency penality has established itself as a technique of government that transcends the penal sphere, playing a crucial role in the economic and social orders. It has been instrumental in cementing a conservative political system and a market economy which is highly unequal and which excludes a large proportion of the population. Therefore, the history of Colombian emergency penality is also the history of the development and dominance of today's neoliberal political economy. Emergency penality relies on a rhetoric about social problems that legitimizes the punitive technologies to treat them. Such technologies set in motion mechanisms of social control and exclusion that preserve the social order in which the neoliberal project may be realized.

Even though the history of emergency criminal justice in Colombia may seem an extreme case, it is by no means an oddity of the late modern world. The neoliberal order originating in western liberal capitalism, which has spread to different countries around the globe, also tends to deploy highly repressive penal technologies against those that it alienates in the economic

and social fields (see Young, 1999; Garland and Sparks, 2000; Wacquant, 2000; Garland, 2001; Rodríguez and Uprimny, 2003). And it increasingly does so by making use of emergency technologies and rhetoric. As Agamben points out, the emergency 'tends increasingly to appear as the dominant paradigm of government in contemporary politics' (2005: 2).

The prevailing neoliberal order creates social spaces of exclusion that are nonetheless subjected to the strict and intense control of the state security forces. This is the case of the inner cities, slums and ghettos of the world's main metropoli; of the ever expanding prisons, which seek to incapacitate, rather than reintegrate to society; of the special detention camps, such as Guantánamo, and of secret prisons for terrorist suspects, where people are stripped of their rights; of the detention centres for immigrants; even the transit and customs areas of international airports.

Colombia's militarization of marginalized urban and rural areas, as well as the mass arrests operations, may seem extreme instances of repressive inclusion of the socially excluded, which particularly affects ethnic minorities as has been shown, but they are not unique at all. Even though it would be inaccurate to talk about a global homogenization of punishment, these examples suggest a drift towards penal convergence (Cavadino and Dignan, 2006: 438, 441), particularly among countries with a neoliberal political economy, where income inequality is high and there is a strong tendency towards social exclusion. In such countries, penal institutions tend to be more punitive and exclusionary than in those nations that are broadly egalitarian, spend a greater proportion of their GDP on welfare and which have a very limited tendency towards social exclusion (Downes and Hansen, 2005: 2, 21–3; Cavadino and Dignan, 2006: 441). In such countries (the Scandinavian ones are the leading example), penal institutions tend to be more inclusionary and less punitive than those of countries with a neoliberal political economy (Downes and Hansen, 2005: 21–3; Cavadino and Dignan, 2006: 441).

The triumph of the neoliberal economic model imported from core countries has had a deep impact on the political and economic transformations that Latin America has experienced during the last three decades. Following the *Washington Consensus*[9] (that is, smaller states with lower deficits and inflation rates, and with fewer powers of intervention in the economy), this recent wave of reformism has been orchestrated and financed mainly by the United States (particularly by its international aid agency, USAID) and international institutions (i.e. the International Monetary Fund (IMF), the Inter-American Development Bank (IDB) and the World Bank (WB)). Accordingly, it is not surprising that the model endorsed by such reforms is a neoliberal one which follows the United States pattern, with a particular focus on the stabilization of the rule of law in the region, the predictability of which is essential for the consolidation of free markets and foreign investment (Rodríguez and Uprimny, 2003). As a matter of fact, these international institutions have conditioned their economic aid to Latin American countries, demanding that they adjust their finances, liberalize their markets, make their labour

legislation more flexible and strengthen their democratic institutions and the judiciary in order to receive such benefits. The capitalist logic is particularly damaging in these countries, which lack the institutional safety net required to protect those who are particularly vulnerable to economic change, leaving them to their own devices, exposed to the rules of the market and the interests of powerful economic groups.

The case of Afro-Colombians is a telling example of such a situation. During the last decade they have been threatened, massacred and forcibly displaced from their ancestral territories, especially on the Pacific coast. This region, which has abundant natural resources and fertile lands, represents valuable economic opportunities for national and foreign economic groups, who are interested in developing hydroelectric mega-projects, agro-industrial plantations (particularly of African palm), ecotourism initiatives and oil exploration. Meanwhile, the lack of state social services in this region is so appalling that the life expectancy of black communities is 54 years, while the life expectancy at a national level is 73 years (AFRODES, 2008; UNICEF, 2008).

Penal technologies and institutions are ideal tools for the establishment in Latin American countries, since they allow it to pursue both of its primary objectives—stability for the markets and public order—simultaneously. For one thing, the crime control field acts as a mechanism of control of those who are recalcitrant and challenge the existing social order, or simply of those who are left behind and usually become involved in crime as a way of survival. For another, it is essential to consolidate the rule of law in order to secure investment and the stability of the market.

The dominance of a conservative penal mode in Colombia has led to an emphasis on the individual responsibility of offenders. Such a vision of crime sees the actions of these individuals as the source of the main problems of society. Social structures and dynamics become invisible; deep-rooted, long-standing problems simply do not enter into the picture. Such a conservative penal culture affirms itself through a series of rhetorical and narrative devices that construct a restricted vision of reality, and that set up a particular kind of response which stresses the primacy of security and order over social justice and inclusion. The history of emergency criminal justice in Colombia shows the deployment of at least four such rhetorical devices: the reductionist vision of social conflict as a problem of law and order; the myth of the sovereign (weak) state as a justification for emergency penality; the legitimization of a restricted version of democracy and the rule of law—especially as it relates to minorities; and the cementing of an emergency mentality where security takes precedence over the enjoyment of rights. These penal narratives nourish the dynamics of social exclusion found in those countries that, like Colombia, have embraced neoliberalism.

Social conflict as a problem of law and order

The penal narrative prevailing nowadays, not only in Colombia, but also in the United States and most Latin American countries, is of vital importance

to politicians for it provides them with a populist punitivism that exploits people's fear and is quite profitable in electoral and governability terms (see Chevigny, 2003). This conservative view participates in what Young calls *the fallacy of the social as simple*. This is the reductionist idea that the social world is a relatively simple structure in which the explanation of a particular phenomenon can be narrowed down to 'delineated changes in other parts of the structure' (Young, 1999: 130). Such an explanation of events encourages a static vision of society where the same problem originates in the same cause. Thus, emergency penality depicts the guerrillas, the paramilitaries, organized crime, terrorism and narcotrafficking as the main causes of most of Colombia's violence and its economic and social problems. This worldview is a common feature of political discourses in Colombia. For instance, when Uribe declared the state of emergency just a few days after taking office, he accused the FARC of being responsible for such a state of affairs:

> The entire nation is subjugated to a terror regime where democratic authority is wrecked and where productive activity is evermore difficult and hazardous, thus multiplying unemployment and the poverty of millions of fellow citizens; … The insecurity situation has resulted in the further decline of rural areas and particularly of the employment conditions and possibilities for the poorest people of the country.
>
> … Such wicked attacks against the Colombian people are mainly caused by the action of armed bands whose organization and finances stem from the immense profit obtained through their direct and increasing involvement in drug trafficking, kidnapping and extortion, which are the main sources of this collective tragedy as well as its closest and most decisive cause.[10]

Such a narrative rules out the possibility of interpreting such phenomena, not as a cause but as an outcome of shifting social processes and relations. It acts as a threshold, a *cordon sanitaire* (Young, 1999: 23) that separates, both conceptually and spatially, society from undesirable and dangerous individuals. It reduces complexity and multiplicity by creating—and excluding—the other.

The war on drugs is a clear example of this political manoeuvre. The current political and legal outlook completely denies narcotrafficking's social and economic roots. Narcotrafficking is the outcome of the actions of powerful groups of individuals that have chosen, for different reasons, to challenge legality and the State. But they are also the result of structural, long-lasting economic and social conditions that are highly inequitable. Such groups are not simply committed to crime and misdemeanours to gain economic profits; they are also fighting, in their own way, for their inclusion and recognition in a society that closes its doors to those who are not born in an advantageous position. Violence and social upheaval in Colombia, just as in other late modern societies, may be explained not only as a problem caused by exclusion but also as a conflict *over* inclusion (see Young, 1999: 13).

Sustaining the myth of the (weak) sovereign state

Through emergency penality, the Colombian state is fighting not only for its salvation; it is also striving to show that it is *capable* of doing so. As Garland (1996: 448, 2001: 109, 110) points out, in a display of might, the State has to sustain the foundational myth of sovereign crime control: that the State is capable of guaranteeing law and order. Crime control takes the central stage in the political debate; politicians know too well that to gain or to retain power is essential to show they have the conviction and ability to confront crime. As Simon (1997, 2007) notes, governments are increasingly tempted to govern through crime.

The use of emergency penality as a technique of government in Colombia has certainly displayed this symbolic function (see García, 1993). It has been an influential tool to affirm, under very difficult conditions of violence and social turmoil, the embattled sovereignty of the Colombian state. Nevertheless, the official version of the besieged state only tells part of the story. For one thing, the establishment has abused the myth of sovereign power by exerting violence, not only against the outlaws, but also against the most vulnerable sectors of society. For another, through their lack of political will, those who hold the reins of power have left almost unchallenged the appalling economic and social conditions of the majority of the population, which are the breeding grounds for discontent, anger and criminality.

A restricted version of democracy and the rule of law

The portrayal of the Colombian political system as an embattled democracy serves an important political purpose: it legitimizes a restricted version of democracy and the rule of law. With the excuse of defending democracy, economic growth and development against the depredations of an internal foe, an emergency regime of restricted rights and authoritarian powers has been implanted throughout Colombia's late modern history. Such a regime, which runs parallel to—and quite often impinges upon—the formal democratic system, affects the whole of the population, for the rule of law is actually abandoned.

The predictability and security of the rule of law are overthrown by the exception, which becomes the norm (see Agamben, 2005). The normalization of the exception causes a restricted idea of the rule of law. A society that lives in fear accepts the limitation of rights and liberties as a normal situation. The idea that exceptional powers for the Government are the only path to salvation from great dangers and foes becomes predominant within society.

'Order first, rights later'

The expansion and normalization of emergency penality has consolidated a punitive rhetoric that sets the limits of legal imagination; it establishes the terms in which legal problems may be posed, thus predetermining the kind

of measures that may be attempted to solve them. Once such rhetoric captures the imagination of politicians and society at large, it becomes commonsense (not subjected to serious scrutiny) and ends up naturalizing what is actually a conservative approach to criminal policy, concerned with the effects of crime and its repression, rather than its causes. The consequences of such a penal commonsense go beyond the crime control field: they sustain a model of society that privileges security, punishment and exclusion over democratic discussion and social inclusion. Hence the mantra of emergency mentality: 'order first, rights later'. Once the former is guaranteed, the latter will follow suit.

Authoritarian liberalism vs egalitarian democracy: the future of emergency penality

Authoritarian liberalism sets up a conservative model of limited democracy, for the main function of democratic institutions is not only to guarantee the calculability of the economic system and the protection of the individual rights (i.e. private property, free enterprise) on which the system is based, but also to guarantee a minimum of freedom and equality for everybody. Both functions are equally important. Authoritarian liberalism only secures the first one; when the most progressive aspects of the democratic regime conflict with the political and economic interests of the ruling groups, the rule of law is abandoned. A broader conception of democracy seeks an equilibrium between freedom and equality, giving priority to the empowerment of citizens and the achievement of social justice. Democracy, understood this way, sees itself as the final and highest criterion of modern social life, and sees itself as taking precedence over capitalism whenever threatened by it (Santos, 2000: 272).

Despite some important reforms in the political system during the last two decades, Colombia has not taken the path of a robust, inclusive democracy. Instead, the conservative establishment has resisted, through legal and illegal means, the most progressive aspects of political reforms, as well as minority ethnic groups and political movements that have challenged the status quo. The consolidation of neoliberalism during the last decade confirms this trend.

The political and economic reforms of the late 1980s and 1990s enhanced a long-lasting struggle between two opposed conceptions of democracy. On the one hand, the political and legal orders that the new Constitution sanctioned have the potential to advance a more inclusive and egalitarian conception of democracy; a coalition of leftist political parties and organizations has defended this political project during the last decade. On the other hand, a bureaucratic elite (Palacios, 2006: 174–8), together with powerful economic groups, which want to keep their privileges, have tried to reduce such reforms to a restricted form of democracy that protects the neoliberal model; this conservative conception of democracy is defended by the current government and its political allies.

Colombia's democratic left: obstacles and challenges in the Latin American neighbourhood

The violence suffered by Colombian society has not simply been caused by subversion, narcotrafficking, paramilitarism or terrorism. It is rather the result of an intense struggle between opposing political and economic projects; one tries to uphold the existing power relations, based on privilege and inequality, with limited concessions to ethnic minorities and emergent social groups; the other strives to vanquish them. Both projects operate within and outside the legal system. The challenge that lies ahead consists in severing the ties between the legal and illegal forms of political struggle; in eliminating armed political activism and replacing it with democratic forms of political participation which are able to accommodate difference and diversity. A significant part of the Colombian Left is taking this path—the Democratic Pole (*Polo Democrático*), a coalition of leftist political parties and organizations created in the late 1990, has proved to be a promising experiment. It has expressly condemned any form of violence to achieve political power, thus radically distancing itself from the guerrillas. At the same time, it has been able to interpret and give a voice to popular discontent about the current state of affairs.

The Democratic Pole's proposal has seemed to pay off—in recent years it has won important elections in different parts of the country (including the mayor's office in Bogotá, the country's capital); it has a significant, though still a minority, representation in Congress and it performed well in the last presidential elections. Even though Uribe was re-elected by a landslide (62% of the votes), the Democratic Pole became the second-largest political force in the country. Its candidate, Carlos Gaviria, came second (winning 22% of the vote), displacing the Liberal Party—the strongest political party during the last four decades (which obtained only 12% of the vote). Therefore, the democratic left has become a real power option in the near future. It remains to be seen whether once in power the democratic left will have the skill and stamina to advance important social and economic reforms, while confronting a complex public order situation. The difficulties are many and of great magnitude.

On the social and economic front, as the recent experiences of many Latin American countries that have elected leftist governments show, it will be almost impossible to renounce the economic orthodoxy dictated from Washington and by the international financial institutions (mainly the World Bank and the International Monetary Fund). Colombia, like most Latin American countries, is bound to maintain a relationship with them—its international debt is significant and it requires further financial resources to make progress in education, health, social security and infrastructure. But within these limits, there is space for manoeuvring, as shown by the Lula government in Brazil, the Vázquez government in Uruguay, the Kirchner administration in Argentina and the Lagos and Bachelet governments in Chile. Though their macroeconomic policies have shown a cautious approach, these governments

have advanced significant social policies, have been critical of the *Washington Consensus* as an adequate model of development for the region, and have looked to open up their economies to international markets, other than the United States (particularly the European Union and China). Argentina, Brazil and Uruguay have been able to pay their debt to the IMF in full, achieving more autonomy in the management of their economies. Thus, even though the centre-left administrations of these countries have not radically departed from the orthodox model imposed by core countries, they have proved able to conduct the economy responsibly, and to put issues of social justice and inclusion back on the political agenda.

Other leftist governments, particularly in Ecuador and Bolivia, have followed the more radical and confrontational project of Hugo Chávez in Venezuela. Under Chávez's wing, these governments have announced a socialist revolution and an open confrontation with the local oligarchies and the imperialist power of the United States. Nevertheless, despite the tantalizing promises of such a socialist project, its real capacity for social transformation is still in doubt and it poses new threats to the fragile democratic institutions of Latin American countries, for it heavily relies on a form of populism which is highly authoritarian (see Lewis, 2006: 243).

The Colombian democratic left has a lot to learn from its neighbours' experiences in order to place the social question at the centre of the political debate. Considering the already violent political and social situation experienced in Colombia, it is hardly necessary to add more tensions through a radicalized and confrontationist political programme. The democratic left also has made scant progress in including ethnic minorities more decisively in its political discourse, beyond the constitutional recognition of their collective rights, based on their possession of a distinct cultural group identity.

Similarly, the Colombian democratic left has to show that it has the will and ability to deal with public order in a determined way, without becoming authoritarian. Narcotrafficking, terrorism and the armed conflict are serious problems that demand a political solution, but which may also need to be confronted with the repressive apparatus of the State. The left cannot avoid this, but it does not have to abuse it either. Law and order, together with the use of institutions of punishment, are an unavoidable aspect of ruling, particularly in a country like Colombia, but they need not be the main or only preoccupation of government.

Colombia's right: the continuation of authoritarian liberalism

The conservative project currently led by president Uribe is still very strong. An important part of the political and economic elite has proved unable to cut its ties with political violence and armed clientelism, as shown by the expansive use of emergency penality, the abuse of human rights committed by the state security forces against civilians and the penetration of paramilitarism in the governing elite.

The Colombian establishment has also the backing of the United States and of international financial institutions, for the current Colombian administration's policies have created a political and economic environment favourable to international investors. These are powerful allies that want to secure their interests in Colombia and that, accordingly, will be willing to sponsor governments that guarantee public order, economic security and advantageous conditions for international capital.

Such a complex context suggests that the intense political struggle will continue in the years to come. The strength of narcotrafficking, the guerrillas and a subtler form of paramilitarism (despite the demobilization of most of such groups during the Uribe administration) is a reminder that violence is still lurking on the horizon. It remains to be seen if the most conservative sectors of the political spectrum will renounce their armed politics and clientelism. So far they do not seem willing to do so. Nevertheless, the progress of criminal investigations against politicians linked to paramilitarism, the advance of the leftist coalition and the international context—increasingly more demanding vis-à-vis the respect of human rights and the rule of law—are determining factors that may force them to change strategy.

Fewer sticks, more carrots: balancing punishment and social inclusion

The current state of affairs shows that the crime control field will continue, for years to come, at the centre of the political stage. It is a powerful political tool for governments and a crucial instrument for dealing with public order. Regarding emergency penality, since it has proved to be useful in political terms (which tend to prioritize symbolic efficacy over instrumental efficacy), governments may be tempted to resort to it in order to rule and legitimize themselves. And as long as there is intense violence, social exclusion and a closed political elite in power, this is a very likely scenario. But not only does the Colombian context play a crucial role in the future of emergency penality; the international scene is also a defining aspect of its development. Globalization has facilitated the legal transplant of penal models (see Newburn and Sparks, 2004; Jones and Newburn, 2007), as the influence of the United States in the Colombian crime control field has shown so eloquently. The wars on drugs and terrorism that have marked Colombia during the last three decades would be inconceivable without the United States' active intervention.

The rules and values of free markets and a conservative conception of democracy increasingly govern the new global order, at the expense of marginalized social groups and ethnic minorities, as the Colombian case shows so clearly. Embedded in an individualist and anxious culture that craves more security and prosperity, it sees crime as the result of the actions of unruly individuals, and as an obstacle to economic growth and full enjoyment of rights. Late modern societies are less willing to understand crime as

a social problem that requires long-lasting social policies; they rather want to see governments doing something about it—that is, going after the culprits; who they are, where they come from or what motivates their actions is of no concern to the majority of the population. Under these circumstances, punishment will be a key instrument of government and political legitimization.

Nonetheless, other answers to deal with crime and social unrest are still possible. Crime is not a natural and unchangeable social fact, but rather the expression of social and power struggles, of opposing interests and of different worldviews colliding. Punishment may very well still be necessary, but a necessary evil that must be used as little as possible (Garland, 1991: 292). Even though crime and punishment will not disappear from the social landscape, it is a political option, and a social responsibility, to devise and test more imaginative and inclusive responses that seek to heal social fractures and make them less likely to occur in the future, instead of excluding and repressing their most disturbing symptoms.

Notes

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1. An average of 2 per cent per capita per year from 1950 to 1997 (Livingstone, 2003: 95).
2. In 2007, out of 41,468,384 inhabitants in Colombia, indigenous people comprised approximately 3.4 per cent of the population (that is, 1,392,623), and black people around 10.6 per cent (4,311,757) (DANE, 2007: 29).
3. For instance, the infant mortality rate among the indigenous population is 63.3 deaths for every 1000 live births, while the illiteracy rate is 24 per cent—both are 50 per cent higher than the respective national averages (World Bank, 2007: 151). As for the black population, Afro-Colombians have the highest infant mortality rates and register high percentages of malnutrition; 60 per cent of Afro-Colombians in rural areas do not have access to health services. Thirty-one per cent of Afro-Colombians are illiterate—almost twice the national average of 16 per cent. Only 14 per cent of Afro-Colombian students attend secondary and superior schools, compared to a 26 per cent national average. Afro-Colombians also have very limited access to the labour market, as they register a 14 per cent unemployment rate, compared to 11 per cent for the rest of the population (World Bank, 2007: 152).

4. Emergency decree 1038 of 1984.
5. Jayasuriya (2000: 318, 319) uses the term *authoritarian liberalism* in a different context, to refer to a post-war form of economic governance, particularly in East Asia, which enables the emergence of the regulatory state—a strong state the purpose of which is to safeguard and regulate a liberal market economy. Cristi (1998: 4 (footnote 6), 175) also uses this term to explain Carl Schmitt's authoritarian conception of the state, according to which a strong state is a precondition for a free economy.
6. During the early 1990s 53.8 per cent of the Colombian population lived under the poverty line (under less than US$2 a day); by 2004, 52.6 per cent of the population lived in poverty. Inequality levels during the 1990s were similar to those observed in 1938 (Perry et al., 2006: 21, 22, 54). According to official figures, between 1993 and 1997 the Gini index increased from 0.51 to 0.56—while the poorest 20 per cent of the population had 2.7 per cent of the national income, the richest 20 per cent had 40 per cent (Núñez and González, 2006: 11).
7. 'Más de seis mil personas detenidas ilegal o arbitrariamente en dos años', *Actualidad Colombiana* (14 August 2007). http://www.actualidadcolombiana.org/archivo.shtml?x=555 (accessed 14 August 2007).
8. 'Palabras del presidente Uribe al instalar Congreso anual cafetero', (10 December 2003). www.presidencia.gov.co/discursos/congresocafetero.htm quoted by Coordinación de Colombia-Europa-Estados Unidos (CCEEU) (2005: 3).
9. According to Dezalay and Garth, the *Washington Consensus* is 'a phrase developed in 1990 to suggest that the U.S. government and the multilateral organizations in Washington had come to an agreement on what kind of state and economy would be appropriate in Latin America' (2002: xv).
10. Emergency decree 1837 of 11 August 2002.

References

AFRODES (2008) *Our Situation*. http://www.afrodes.org/ (accessed 1 April 2008).

Agamben, Giorgio (2005) *State of Exception*. Chicago: University of Chicago Press.

Amnesty International (2002) *Colombia: Seguridad, ¿a qué precio? La falta de voluntad del gobierno colombiano para hacer frente a la crisis de los derechos humanos*, December. London: Amnesty International.

Ariza, Libardo, Felipe Cammaert and Manuel Iturralde (1997) *Estados de excepción y razón de estado en Colombia*. Bogotá: Estudios Ocasionales CIJUS, Uniandes.

Cavadino, Michael and James Dignan (2006) 'Penal Policy and Political Economy', *Criminology and Criminal Justice* 6(4): 435–56.

Chevigny, P. (2003) 'The Populism of Fear: Politics of Crime in the Americas', *Punishment and Society* 5(1): 77–96.

Committee on the Elimination of Racial Discrimination (CERD) (1999) *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Colombia*. http://www.acnur.org/biblioteca/pdf/1521.pdf (accessed 1 April 2008).

Coordinación Colombia-Europa-Estados Unidos (CCEEU) (2005) *Libertad: rehén de la 'seguridad democrática'. Resumen ejecutivo*, Bogotá, 17 August. http://dhcolombia.info/IMG/pdf/libro_detenciones.pdf (accessed 15 August 2007).

Cristi, Renato (1998) *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*. Cardiff: University of Wales Press.

DANE (2007) *Colombia: una nación multicultural. Su diversidad étnica*. http://www.dane.gov.co/files/censo2005/etnia/sys/colombia_nacion.pdf (accessed 1 April 2008).

Dezalay, Yves and Bryant Garth (eds) (2002) *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*. Ann Arbor: University of Michigan Press.

Downes, David and Kirstine Hansen (2005) *Welfare and Punishment in Comparative Perspective*. http://www.cls.ioe.ac.uk/core/documents/download.asp?id=748&log_stat=1 (accessed 23 September 2007).

Dulitzky, Ariel (2005) *A Region in Denial: Racial Discrimination and Racism in Latin America*. http://www.utexas.edu/law/academics/centers/humanrights/adjudicating/papers/Deniallastversion.pdf (accessed 1 April 2008).

García, Mauricio (1993) *La eficacia simbólica del derecho: estudio de situaciones colombianas*. Bogotá: Uniandes.

García, Mauricio (2001) 'Constitucionalismo perverso: normalidad y anormalidad constitucional en Colombia: 1957–1997', in Boaventura de Sousa Santos and Mauricio García (eds) *El caleidoscopio de las justicias en Colombia*, pp. 317–70. Bogotá: Colciencias, Instituto Colombiano de Antropología e Historia, Universidad de Coimbra-CES, Universidad de los Andes, Universidad Nacional de Colombia, Siglo del Hombre.

Garland, David (1991) *Punishment and Modern Society: A Study in Social Theory*. Oxford: Oxford University Press.

Garland, David (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', *British Journal of Criminology* 36(4): 445–71.

Garland, David (2001) *The Culture of Control: Crime and Order in Contemporary Society*. Oxford: Clarendon.

Garland, David and Richard Sparks (2000) 'Criminology, Social Theory and the Challenge of Our Times', in David Garland and Richard Sparks (eds) *Criminology and Social Theory*, pp. 1–22. Oxford: Oxford University Press.

Inter-American Commission on Human Rights (IACHR) (1999) *Third Report on the Human Rights Situation in Colombia*. http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm (accessed 1 April 2008).

Inter-American Commission on Human Rights (IACHR) (2006) *Annual Report of the Inter-American Commission on Human Rights 2006: Colombia*. http://www.cidh.org/annualrep/2006eng/Chap.4.htm#COLOMBIA (accessed 1 April 2008).

Jayasuriya, Kanishka (2000) 'Authoritarian Liberalism, Governance and the Emergence of the Regulatory State in Post-Crisis East Asia', in Richard Robison, Mark Beeson, Kanishka Jayasuriya and Hyuk-Rae Kim (eds) *Politics and Markets in the Wake of the Asian Crisis*, pp. 315–30. London: Routledge.

Jenson, Jane and Boaventura de Sousa Santos (eds) (2000) *Globalizing Institutions: Case Studies in Regulation and Innovation*. Aldershot, UK: Ashgate.

Jones, Trevor and Tim Newburn (2007) *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy*. Maidenhead, UK: Open University Press.

Lewis, Paul H. (2006) *Authoritarian Regimes in Latin America: Dictators, Despots, and Tyrants*. Lanham, MD: Rowman & Littlefield.

Livingstone, Grace (2003) *Inside Colombia: Drugs, Democracy and War*. London: Latin American Bureau.

Newburn, Tim and Richard Sparks (eds) (2004) *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control*. Devon: Willan.

Núñez, Jairo and Néstor González (2006) *Colombia en el contexto de las Metas del Milenio: tropiezos, logros y el camino hacia delante*. Bogotá: Documento CEDE 2006–02. http://economia.uniandes.edu.co/~economia/archivos/temporal/d2006-02.pdf (accessed 10 July 2006).

Observatorio del Porgrama Presidencial de Derechos Humanos y DIH (2008) *Indicadores de situación de derechos humanos. Chocó*. http://www.derechoshumanos.gov.co/observatorio/departamentos/choco.pdf (accessed 1 April 2008).

Palacios, Marco (2006) *Between Legitimacy and Violence: A History of Colombia, 1875–2002*. Durham, NC: Duke University Press.

Pécaut, Daniel (2001) *Guerra contra la sociedad*. Bogotá: Espasa.

Perry, Guillermo E., Omar S. Arias, J. Humberto López, William F. Maloney and Luis Servén (2006) *Poverty Reduction and Growth: Virtuous and Vicious Circles*. Washington, DC: World Bank Latin American and Caribbean Studies.

Rodríguez, César and Rodrigo Uprimny (2003) '¿Justicia para todos o seguridad para el mercado? El neoliberalismo y la reforma judicial en Colombia y en América Latina', in D. Restrepo (ed.) *La falacia neoliberal: crítica y alternativas*, pp. 415–51. Bogotá: Universidad Nacional de Colombia.

Santos, Boaventura de Sousa (2000) 'Law and Democracy: (Mis)trusting the Global Reform of Courts', in Jane Jenson and Boaventura de Sousa Santos (eds) *Globalizing Institutions: Case Studies in Regulation and Innovation*, pp. 253–84. Aldershot, UK: Ashgate.

Sen, Amartya (2006) *Identity and Violence: The Illusion of Destiny*. London: Allen Lane.

Simon, Jonathan (1997) 'Governing through Crime', in Lawrence Friedman and George Fisher (eds) *The Crime Conundrum: Essays on Criminal Justice*, pp. 171–90. Boulder, CO: Westview Press.

Simon, Jonathan (2007) *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford University Press.

Thoumi, Francisco (1995) *Political Economy and Illegal Drugs in Colombia*. Boulder, CO: Lynne Rienner.

United Nations Children's Fund (UNICEF) (2008) *Colombia. Statistics*. http://www.unicef.org/infobycountry/colombia_statistics.html (accessed 1 April 2008).

United Nations High Commission for Human Rights (UNHCHR) (2005) *Report of the High Commissioner for Human Rights on the Situation of Human Rights in Colombia 2004*. http://www.hchr.org.co/documentoseinformes/informes/altocomisionado/Informe2004_eng.pdf (accessed 15 August 2007).

Uribe, Álvaro (2002) *Manifiesto democrático. 100 puntos de Álvaro Uribe Vélez*. http://www.presidencia.gov.co/prensa_new/documentos/agosto/07/documen.htm (accessed 15 August 2007).

Villa, William and Juan Houghton (2005) *Violencia política contra los pueblos indígenas en Colombia 1974–2004*. Bogotá: Centro de Cooperación al Indígena (CECOIN), Organización Indígena de Antioquia (OIA), Grupo Internacional de Trabajo sobre Grupos Indígenas (IWGIA). http://observatorioetnico.org/cms/content/blogsection/6/82/ (accessed 1 April 2008).

Wacquant, Loïc (2000) *Las cárceles de la miseria*. Madrid: Alianza.

World Bank (2007) *Colombia 2006–2010: A Window of Opportunity*. http://siteresources.worldbank.org/INTCOLOMBIA/Resources/324863-1175545703139/Parte_2.pdf (accessed 1 April 2008).

Young, Jock (1999) *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity*. London: SAGE.

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